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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC. and RAMONA BENNETT,
Petitioners,
v.
THE DEPARTMENT OF GAME, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF AMICI COLVILLE, LOWER ELWHA, LUMMI, MAKAH, MUCKLESHOOT, NISQUALLY, NOOKSACK, PORT GAMBLE, QUILEUTE, QUINAULT, SKOKOMISH, SQUAXIN ISLAND, AND SUQUAMISH INDIAN TRIBES AND TRIBAL COMMUNITIES, AND NORTHWEST INDIAN FISHERIES COMMISSION IN SUPPORT OF PETITIONERS

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I

INTEREST OF AMICI CURIAE

Amici Treaty Indian Tribes listed below[1] are all tribes which are signatories to treaties with the United States government.[2] Each treaty contains language guaranteeing hunting and fishing rights similar to language found in the Treaty of Medicine Creek involved in this litigation.

1. Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble, Quileute, Quinault, Skokomish, Squaxin Island, and Suquamish.

2. Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 28, 1855, 12 Stat. 933; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty with the Quinaeilt, July 1, 1855, 12 Stat. 971.

Amici Northwest Indian Fisheries Commission (N.W.I.F.C.) is a voluntary association of Western Washington Indian Tribes conceived and organized by the tribes themselves in order to facilitate the implementation of *United States v. Washington,*[3] (Civil Cause No. 9213, W.D. Wash. 384 F.Supp. 312 (1974), 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). (Whenever *United States v. Washington* is referred to herein, it is this cited case and *not United States v. Washington*, 496 F.2d 620 (9th Cir. 1974), *cert. denied*, 419 U.S. 1032 (1974), involving the Puyallup Tribe.)

Amici Confederated Tribes of the Colville Indian Reservation are federally-recognized Indian tribes occupying a reservation which encompasses 1.3 million acres in the eastern portion of the State of Washington. The Reservation on which the Tribes reside was established by Executive Order on July 2, 1872 (1 KAPPLER 916) and is governed by a Constitution and By-Laws approved by the Secretary of the Interior on February 26, 1938.

Amici treaty tribes are each parties to *United States v. Washington, supra,* the continuing adjudication of treaty

3. N.W.I.F.C. is an unincorporated association formed in 1974 by treaty tribes which are parties to *United States v. Washington*. The Commission was formed to formulate a broad general fisheries program designed to promote and coordinate the conservation practices of the member tribes. It is composed of one representative from each of the five treaty areas. Each treaty area is represented by a treaty council which elects a single representative to serve as a commissioner on the Commission. Each treaty area is also served by a coordinator, a paid staff member who asists the tribe in developing and coordinating their fisheries programs. The coordinators maintain treaty area offices and serve as communication links between the tribes in the central Commission office. The central office is located in Olympia, Washington. This office houses an administrative and public relations staff and the office of biological programs.

fishing rights in Western Washington.[4] In *United States v. Washington,* amici treaty tribes and others were required to accept the responsibility of the management of their fisheries. *See* 384 F.Supp. at 340, and Program to Implement Interim Plan, Appendix "A" herein. This responsibility has required tribal governments to manage fisheries which occur both on and off-reservation. Amici Colville Tribes have the exclusive responsibility of regulating on-reservation fisheries.[5] *Confederated Tribes v. Washington,* 412 F.Supp. 615 (E.D. Wash. 1976). The only issue before this Court deals with the power of the State of Washington to interfere with tribal on-reservation fishery management. A ruling by this Court will affect amici's continuing ability to manage their own resources, and could well interfere with the continuing adjudication in *United States v. Washington.*

Further, on September 16, 1976, certain amici tribes filed an amended and supplemental complaint for declaratory judgment in *United States v. Washington* (Phase II). Phase II seeks to finally determine the treaty Indian entitlement to hatchery fish and seeks to prevent further State destruction of the fish resource. The supplemental complaint avers that the fish habitats have been destroyed or altered thus causing a dimunition of the fish resource. The State of Washington has had the power to prevent this substantial dimunition, but has not done so.

The District Court in Phase II will decide the treaty right to harvest hatchery fish,[6] after considering all of the tribal

4. N.W.I.F.C. and the Colville Tribes are not parties to *United States vs Washington*. N.W.I.F.C. assists the tribal parties to that case in facilitating Indian fisheries. The Colville Tribes exercise exclusive on-reservation regulation and management of fisheries. *Confederated Tribes v. Washington*, 412 F.Supp. 651 (E.D. Wash. 1976).

5. The Colvilles also exercise substantial off-reservation regulatory authority. *See Antoine v. Washington*, 424 U.S. 194 (1975).

6. The supplemental complaint avers that the State of Washington

situations in Western Washington, and examining each of the rivers.[7] It appears that the respondents in the instant case are urging this Court to consider this issue as it relates solely to the Puyallup River and to steelhead. Such a ruling, if made, could have a significant and adverse effect upon the continuing litigation in *United States v. Washington* and the tribes party thereto.

For these reasons, amici have a substantial interest in the outcome of this litigation. In addition to the comment on the specific issue presented by this appeal, this brief is a request to the Court to limit the appeal to the narrow issue presented by petitioners. Any broadening of the scope of the appeal will work a grave injustice not only on all amici but all other Indian tribes wherever situated who have not had the opportunity to present the complete factual and legal matrix within which federally-protected fishing rights exist. Without "competing examples" the record is woefully insufficient to allow a proper adjudication.[8]

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has introduced hatchery-reared fish to mitigate the adverse impacts of overfishing and environmental degradation and to some degree fish of hatchery origin have replaced or become inextricably comingled with native fish. These issues were not adequately dealt with in the case below.

7. The Puyallup Tribe is a party to *United States v. Washington* and will participate in Phase I' The hatchery issue even as it pertains to the Puyallup can better be dealt with in Phase II.

8. In "An Introduction to Legal Reasoning", Edward H. Levi noted:

> What does a law forum require? It requires the presentation of competing examples. The forum protects the parties by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which, if different things are to be treated as similar, at least the differences have to be urged. In this sense, the parties as well as the court participate in the lawmaking.

Edward H. Levi "An Introduction to Legal Reasoning" University of Chicago Press, 1948, p. 5.

In the present case, the Puyallup situation is just one example (and an atypical one at that) of reservation fishing.

II

SUMMARY OF ARGUMENT

A. The State of Washington has no jurisdiction to regulate fishing by tribal members on an Indian reservation. Establishment of Indian reservations vests substantial fishing rights in Indian tribes. *Menominee v. United States*, 391 U.S. 404 (1968). These substantial rights are subject to tribal control and the State may not regulate or interfere with the Tribe's exercise of sovereign power over fishing and hunting affairs within its reservation. *See, Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); *Hunt v. United States*, 278 U.S. 96 (1928); *Mason v. Sims*, 5 F.2d 225 (W.D. Wash. 1925). Such rights continue unless explicitly abrogated or terminated by act of Congress. *Menominee v. United States*, 391 U.S. 404 (1968). No act of Congress can be found that would grant to the State of Washington power to regulate Indian fishing within the boundaries of an Indian reservation. The only remotely relevant act of Congress, Public Law 83-280, expressly states the intent of Congress to disable the State from assuming such power. The State statute carrying into effect P.L. 83-280 within Washington contains an express disclaimer that nothing in the act shall deprive the Indian tribes of the control, licensing or regulation of fishing. (*See Antoine v. Washington*, 424 U.S. 194, n.10 (1975), RCW 37.12.060)

B. Respondents have sought to interject before this Court two additional issues not properly raised by this Court's grant of certiorari; 1) an interpretation of Indian treaties with the federal government; and 2) a determination that Indian fishermen do not have a treaty right to fish for so-called artificially-propagated salmon and steelhead.

Neither of these issues are now ripe for decision by this Court.

This Court is without facts relating to these issues upon which to make a properly reasoned judgment. While the decision of this Court will potentially affect at least 23 tribes and impliedly interpret five treaties, the scant record before this Court deals with only one tribe, the Puyallup, and one treaty.

Both issues are now or have been before the Federal District Court for the Western District of Washington in the case of *United States v. Washington*. Both petitioners and respondents herein are parties to that case. The record deficiencies found here are not present in that case. In *United States v. Washington*, the District Court had before it all treaties negotiated between tribes in Western Washington and the United States. The Court was called upon to interpret each one. The District Court found, as a matter of federal law, the proper allocation of fish between treaty and non-treaty fishermen and their relative rights under the treaties. That ruling is *res judicata* as to the State of Washington. *United States v. Washington, supra*. The District Court has set a trial date for a final resolution of the treaty entitlement to hatchery fish. All parties, including the Puyallup Tribe and the State of Washington, have expressed their intention to participate therein.

C. The decision of the court below misapplies and ignores fundamental tenets of Indian law, is based on incorrect factual assumptions and improper analogies, and adopts a rationale thoroughly discredited by previous rulings of this Court.

III

ARGUMENT

A. The State has no jurisdiction to regulate on-reservation fishing or allocate fish on-reservation between treaty and non-treaty fishermen

The sole question that this Court is being asked to resolve is whether the State of Washington may control the fishing activity of the members of the Puyallup Tribe within the boundaries of the Puyallup Indian Reservation.

This case has twice been before the Court for review and it has always been considered an off-reservation fishing case having no application to on-reservation fishing. *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 342, 396 n. 11 (1967). No change in scope was indicated by this Court in its second opinion. *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973).

Despite the original limited nature of this case, the State Supreme Court suddenly transformed it and extended State regulatory authority to Indian on-reservation fishing. 86 Wn.2d 664, 668. Given that transformation, the rulings of Puyallup I and II should have no application.

1. *The genesis of on-reservation fishing rights*

Tribal fishing rights in Washington predate, of course, treaties such as the Treaty of Medicine Creek. Treaties made with Indian tribes during the years of western expansion are instruments which recognize and affirm such rights and not instruments which constitute a grant of rights *to* the Indians. *United States v. Winans*, 198 U.S. 371, 381 (1905).

Before treaties and agreements were made with Washington tribes, fishing was a major source of food and a

major commercial activity.[9] Thus the importance of reserved fishing rights to the tribes.

The instrument establishing the reservation need not specifically enumerate fishing rights for such rights to exist. Where no specific mention of the right to hunt and fish was made, ". . . such a reservation was not necessary to preserve the right on land reserved or retained in Indian ownership. The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right remains in them unless granted away." Federal Indian Law, 496-498[10] citing Op. Act. Sol. M.28101, June 30, 1936.

2. *The nature and scope of on-reservation fishing rights*

It is well settled that Indian treaty rights must be viewed in light of the special trust relationship between Indian tribes and the United States and the special canons of construction formulated by this Court. *See Bryan v. Itasca County, Minnesota,* .... U.S. ...., 96 S.Ct. 2101 (1976), *Antoine v. Washington,* 424 U.S. 194 (1975). These rules are designed to ensure that the benefits intended for Indians by the treaties are actually realized.

Thus it has been held that the nature and scope of the Indian right to fish and wildlife on a reservation is absolute vis-a-vis the state. A state has no authority to interfere

9. *See United States v. Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), p. 350 *et seq. See also* TEIT & BOAS; THE SALISHAN TRIBES OF THE WESTERN PLATEAUS, 45th B.A.E. Annual Report, 1927, (facsimile reproduction by Shorey Bookstore, 1973) at p. 237, 242.

10. *Federal Indian Law,* 1958, is a revision of the *Handbook of Federal Indian Law,* prepared by the office of the Solicitor under the editorial direction of Felix S. Cohen, Assistant Solicitor, and first printed in 1940. References in this brief are to the 1966 reprinting by the Association on American Indian Affairs, Inc. of the 1958 revision of the *Handbook.*

with hunting on federal lands. *Hunt v. United States,* 278 U.S. 96 (1928). Wildlife on a reservation belongs to the Indians as their property. *Mason v. Sams,* 5 F.2d 255 (W.D.Wash. 1925); *Pioneer Packing v. Winslow,* 159 Wash. 655, 294 P. 557 (1930).

Every court which has had occasion to consider the question has found that on-reservation fishing by Indians is beyond the reach of state regulation. *See, e.g., Kimball v. Callahan,* 493 F.2d 564 (9th Cir. 1974) *cert. denied,* 419 U.S. 1019 (1974); *Moore v. United States,* 157 F.2d 760, 765 (9th Cir. 1946), *cert. denied,* 330 U.S. 827 (1946); *Mason v. Sams,* 5 F.2d 255 (D.Wash. 1925); *Leech Lake Band v. Herbst,* 334 F.Supp. 1001 (D.Minn. 1971).[11] Indeed, the exclusivity of Indian regulation over *all* fishing (Indian and non-Indian) has been noted. *Colville v. Washington,* 412 F.Supp. 651 (E.D.Wash. 1976). Within a reservation, Indians are exempt from state conservation regulations. *Moore v. United States,* 157 F.2d 760 (9th Cir. 1946), *cert. denied,* 330 U.S. 827 (1947); *Kimball v. Callahan, supra.* The state may not interfere with tribal on-reservation wildlife laws. *Quechan v. Rowe,* 350 F.Supp. 106 (1972).

Clearly, establishment of reservations vested substantial and far-reaching fishing rights in the Indians, over which the State of Washington has no control or authority absent relinquishment of those rights by the Indians or abrogation of such rights by the Congress.[12]

11. This Court has always indicated that on-reservation fishing by members of an Indian tribe is not a matter for state control. *See Menominee v. United States,* 391 U.S. 404 (1968); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918).

12. At the time that the rights vested, i.e., 1855, Washington was not yet a state. However, the subsequent fact of statehood does not change the authority or control of the state. A state must accept statehood subject to whatever outstanding rights and guarantees exist at the

The on-reservation fishing rights reserved by the tribes are clearly more extensive than the off-reservation rights reserved.

In *United States v. Washington*, the District Court succintly stated the difference, pointing out the exclusive right of Indians to act on-reservation:

> An *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations . . . . The tribes also reserved the *right* to off reservation fishing 'at usual and accustomed grounds and stations' . . . . However, off-reservation fishing by other citizens and residents of the State is not a *right* but merely a *privilege* which may be granted, limited or withdrawn by the State as the interests of the State or the exercise of treaty fishing rights may require.

384 F.Supp. at 322.

3. *The states have never been granted a regulatory authority over tribal on-reservation fishing.*

One searches in vain for any grant of authority such as that claimed by the State in this proceeding which would allow it to regulate or control the taking of fish from waters within the reservation.

The State of Washington has never seriously attempted to regulate fishing within the bounds of a reservation. Indeed, in the case of *United States v. Washington*, 384 F.Supp. 312 (1974), the District Court observed that:

> All parties in this case agree that on-reservation fishing is not subject to State regulation and no issue to the contrary is presented in this case. Indeed any contention to the contrary would be diametrically opposed to the Indian self-government intent and philosophy of Congress.

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time of statehood. *See United States v. Winans*, 198 U.S. 371 at 382-84 (1905). *See also, Coyle v. Smith*, 321 U.S. 559, 570 (1911) and *Johnson v. Geralds*, 234 U.S. 442, 438-40 (1914); *Metlakatla v. Egan*, 369 U.S. 45, 59 (1962); *Antoine v. Washington*, 424 U.S. 194 (1975).

384 F.Supp. at 341. Both the Puyallup Tribe and the State of Washington are parties to *United States v. Washington*. It is difficult to see how the State, absent any new authority, and in the face of repeated denials of state power can legitimately contend before this Court that it has power over on-reservation fishing activities.

Congress has never chosen to exercise its plenary authority over Indian tribes by granting to states power to regulate on-reservation fishing. Such an exercise of Congress' authority would be, in effect, an abrogation of the reserved treaty right of Indians to fish on their reservations. If Congress were to exercise its authority it must exercise it expressly, and such an intent to abrogate must be clear on the face of the legislation or from the surrounding circumstances. *Menominee Tribe v. United States*, 391 U.S. 404 (1968), *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974), *Seymour v. Superintendent*, 368 U.S. 351 (1962).

In the only remotely relevant act of Congress, Congress expressly acted to ensure that states would *not* acquire any jurisdiction over on-reservation activities. P. L. 83-280, 67 Stat. 588, 18 U.S.C. §1162 (1953). Public Law 280 was primarily designed as a vehicle to extend state criminal laws and procedures to Indian reservations. It came out of the termination period where tribal self-government was not vigorously supported by Congress. *Bryan v. Itasca County, Minnesota*, ... U.S. ....., 96 S.Ct. 2101 (1976) At a time when Congress was granting new powers to states, it is significant that Congress expressly denied to states the power to regulate treaty on-reservation fishing. Section 2(b) of P. L. 280, 18 U.S.C. 1162(b) reads as follows:

> Nothing in this section . . . shall deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof.

This Court has expressly noted that Public Law 280 does not deprive tribes of rights secured by any one of the federal promises mentioned (*i.e.*, treaty, agreement, statute or executive order.) *Antoine v. Washington*, 43 L.Ed.2d 129, 137 n. 10 (1975). *See also, Arnett v. 5 Gillnets*, 121 Cal. Rptr. 906 (1975), *cert. denied*, 47 L.Ed.2d 557 (1976). This Court's notation in *Antoine* is consistent with the whole history of litigation involving Indian fishing and hunting rights which cases consistently find that the control and regulation of fishing is of prime importance to Indian tribes. Under long-established canons of construction concerning congressional enactments regarding Indian rights, P. L. 83-280 must be construed in a light favorable to them. *Antoine v. State, supra; Morton v. Ruiz*, 94 S.Ct. 1055 (1974); *see also Seminole Nation v. United States*, 316 U.S. 286 (1942). Thus, the statute must be read to deny to the state any jurisdiction over the control, licensing or regulation of fishing on a reservation.

4. *The exclusive tribal right to regulate on-reservation fishing activities is consistent with the doctrines of sovereignty and tribal self-government and with subsequent acts of Congress dealing with Indian self-determination.*

This Court has always recognized the quasi-sovereign status of Indian tribes, wherein all powers including those of self-government rest with the tribe until those powers are abrogated by Congress. *United States v. Mazurie*,

419 U.S. 544, 557 (1974) Relying on *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the court in *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) held:

> . . .[I]ndian nations and tribes are distinct political entities, having territorial boundaries within which their authority is exclusive; that within their boundaries they have their own government, laws, and courts, and are not subject to the laws of the state in which they are located or to the laws of the United States, except where Federal laws are made applicable to them by congressional enactment, and that Federal courts are without jurisdiction unless jurisdiction is expressly conferred by congressional enactment.

272 F.2d at 133. *See also Arizona ex rel. Merrill v. Tuttle*, 413 F.2d 683 (9th Cir. 1969). In *Williams v. Lee*, 358 U.S. 217 (1959), this Court reiterated the well-established rule:

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken from them, it is for Congress to do it.

358 U.S. at 223.[13]

Congress not only accepts the concepts of tribal quasi-sovereignty and the power to regulate on-reservation activity, it has recently acted to strengthen and reaffirm those concepts. The Indian Civil Rights Act of 1968, 25 U.S.C. §1321-1326, the Indian Self-Determination Act, 25 U.S.C. §450 (f) *et seq.* (1975), and the Indian Financing Act of 1974, 25 U.S.C. §1451 *et seq.*, are all recent enactments of Congress which tend to either limit the assumption of state jurisdiction over on-reservation activities or to facili-

13. *Williams v. Lee*, held that states could not assume jurisdiction on reservations when such assumption would interfere with the right of tribes to make their own laws and be governed by them. It is elementary, that the assumption of jurisdiction here requested by the State of Washington would wipe out the ability of the Puyallup Tribe to enact any law dealing with the most vital on-reservation activity—fishing. Such a result would be diametrically in opposition to the result reached by this Court in *Williams v. Lee*.

tate tribal expansion of jurisdiction over on-reservation activities.

Despite the overwhelming case law cited above, the State Court still found that the ability of the State to regulate on-reservation activity "at the most simply not precluded by the existence of the Puyallup Reservation, and at the least an open question after *Matts v. Arnett*, 412 U.S. 481, 485 (1962)," 86 Wn.2d at 668. The State Court's reliance on *Matts v. Arnett* is totally misplaced. The sole question before the court in *Matts* was whether or not the Klamath Indian Reservation continued to exist. This Court specifically declined to rule on whether or not in the unique situation which existed on the Klamath Reservation state jurisdiction could be applied thereon. On remand, the California Supreme Court held that state jurisdiction did *not* extend onto the Klamath Reservation for purposes of regulating reservation fishing activities. *Arnett v. 5 Gillnets*, 121 Cal. Rptr. 906 (1975), *cert. denied*, 47 L. Ed. 2d 557 (1976)

Alternatively, the court below reasoned, "The Supreme Court's clear mandate in *Puyallup II* would seem to include on-reservation state jurisdiction". 86 Wn.2d at 669. Of course, such an implied abrogation of treaty rights is inconsistent with the basic principles of treaty interpretation consistently announced by this Court and certainly cannot be assumed by the remand in *Puyallup II*.

To hold that the State of Washington has jurisdiction to regulate on-reservation fishing would be a denial not only of the express language of Public Law 280, but in direct contravention of the clear intent of Congress expressed in subsequent acts in which the continued sovereign power of tribes was not only recognized, but encouraged. The State's bid to assume jurisdiction in the present case must be denied.

5. *The tribe's right to regulate on-reservation fishing is not diminished merely because of an incidental off-reservation effect, nor is this Court empowered to make policy decisions to deal with such effects*

As noted above, the Washington State Supreme Court found the power to regulate on-reservation fishing in part as a necessary incident to its off-reservation regulation. The court below found that this Court's remand in *Puyallup II* would seem to imply on-reservation jurisdiction. 86 Wn.2d 664, 668-69.[14]

Possible off-reservation adverse effects resulting from exercise of on-reservation guarantees do not constitute grounds to abrogate treaty rights. *Winters v. United States*, 207 U.S. 654 (1908); *Arizona v. California*, 373 U.S. 546 (1962). This Court in *Arizona and Winters* premised its holding on the proposition that the treaties reserved sufficient water to fulfill the purposes for which the reservations were established. In the cases of *Winters* and *Arizona*, water was needed to irrigate the reservations.

The maintenance of a fishery on the reservations in *United States v. Washington* is as important to the realization of the initial purpose of those reservations as the recognition of an on-reservation water right was to the reservations in the Southwest. To accept the State's proposition that it may control on-reservation fishing merely because such activity may have some effect off-reservation, would be to deny to

14. This proposition must be premised upon the baseless assumption that Indian tribes are either incapable or unwilling to regulate their own fisheries. As noted in Section 6, *infra*, Indian tribes not only have shown a willingness to regulate fishing in the past, but are now under court orders to improve and maintain that regulatory ability and have so complied.

the tribes the ability to realize the benefits of their reservations, and impliedly work in abrogation of the treaties involved.

The abrogation of treaty rights, the limitation thereof, or the extension of the plenary power of the United States to tribes rests exclusively with the United States Congress, and any changes should be made by it. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903).

> Plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning and the power has always been deemed a political one not subject to be controlled by the judicial department of the government.

Lonewolf v. Hitchcock, supra, at 556. *See also Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

6. *Indian tribes in Washington have sufficient authority and ability to regulate on-reservation fishing for conservation purposes*

The authority and continuing ability of Indian tribes to manage and control their own fisheries has been recently affirmed in *United States v. Washington*[15]. The Petitioner herein, amici treaty tribes, and the State of Washington were parties. The case represented a major and united effort of tribes of Western Washington and the United States Government to force the State of Washington to recognize and respect the tribes' off-reservation treaty right to fish. The case dealt exclusively with the relationship between the State and tribes in the off-reservation harvest and management of anadromous fish. However, the principles and findings enunciated in *United States v. Washington* are dispositive of the ancillary objections raised by the State and other intervenors in the present case.

15. *See: United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974); *see also, Colville v. State*, 412 F.Supp. 651 (E.D. Wash. 1976).

The District Court found that Indian people have consistently maintained a high respect for the resource.

> With a single possible exception testified to by a highly interested witness (FF 102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance remote or recent, when a definitely identifiable member of any Plaintiff Tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.
>
> Unfortunately insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this Court.

384 F.Supp. 312, 338, n. 26.

The District Court's findings is consistent with the *facts* found in the present case. The State's own witnesses described the tribe's steelhead fishery as rather orderly with closed periods being honored "very carefully." (St. 1103-04.)

For the first time in the Indian fishing controversy, *United States v. Washington* opened up avenues of communication between the State and tribes. The District Court required all tribes including the Puyallup Tribe to provide tribal fish catch reports, indicating both on and off reservation treaty harvests, whenever requested by Fisheries or Game. (*See United States v. Washington*, Order of Oct. 8, 1974, Appendix "A" herein.) These reports facilitate the State's ability to establish escapement goals and are used

for other reasonable and necesary conservation purposes. All tribes are complying with this provision. Similarly in post-decision orders the district court has ordered that the tribes convey to the Departments of Fisheries and Game initial pre-season estimates of their on-reservation harvests, ceremonial harvests, and subsistence harvests.[16] In addition, tribes are barred from engaging in any off-reservation fishing unless specific and biologically sound regulations have been adopted by each tribe. 384 F.Supp. 312, 340 (1974). Quite clearly fishing is no longer being conducted by tribes in a vacuum. The State of Washington is receiving more information now than it has ever received in the past. With an opening of off-reservation fishing after *United States v. Washington*, the impact of on-reservation fishing has been diminishing. At the same time, knowledge of on-reservation fishing activities has been increasing as tribes continue to comply with Judge Boldt's orders.

As a result of *United States v. Washington* Indian tribes have increased their management capabilities to a point that they often exceed the State's abilities. Tribal biologists have been employed to meet Court-ordered requirements that the tribes file specific regulations and take responsibility for the management of their fisheries.[17] Indian tribes have bound together to form the Northwest Indian Fisheries Commission, an all Indian organization made up of all case area tribes designed to facilitate and coordinate fishing activities of all tribal members.[18] The District Court has called on this organization numerous times and has referred to it countless times in post-decision orders. One of the District Courts primary orders was to establish the

16. See, Appendix "A" herein.
17. See Appendix "B".
18. See Footnote 3, *supra*.

Fisheries Advisory Board. (Order of Dec. 17, 1976, App. "D" herein) The Northwest Indian Fisheries Commission is responsible for selecting the Indian delegate to this arbitration and consultation board. Indian tribes in furtherance of the management responsibilities ennunciated in *United States v. Washington* have undertaken numerous projects designed to enhance the resource not only for their own benefit, but for the benefit of all persons.[19] Quite clearly it is an unfair statement to indicate that tribes are not capable and willing to manage their own resource. They have acted as responsibly as the State in assuring that their activities do not infringe upon the preservation of the resource.

The court below fails to recognize the nature of tribal governments. Like any government, Indian governments have power over their citizens (members) and most importantly over their territory.

19. A list of tribal government fish plants is attached as Appendix "C". This list was submitted as evidence by affidavit in a recent proceeding in *United States v. Washington*. Many of the tribes have substantial enhancement and artificial propagation projects and facilities. Amicus Lummi Tribe, for example, operates a multimillion dollar aquaculture project on the reservation. This project includes a fish hatchery, oyster hatchery, sea pond, outside oyster growing operation, joint fishing ventures and processing. The hatchery has an incubation capacity of approximately five and one-half million eggs a year and operates with a normal crew of 13 in addition to the management. Amicus Makah Tribe is currently constructing a seven and one-half million dollar hatchery on the Makah Indian Reservation under the auspices of the U.S. Fish and Wildlife Service. This hatchery will produce several million young fish each year for planting in all streams throughout Western Washington. The considerable amount of land necessary for the operation and other support services are being supplied by the tribal government at tribal expense. Amicus Quinault Tribe has, for some time, operated fisheries enhancement programs, including the production of sockeye, chum and steelhead and currently operates the Quinault National Fish Hatchery in cooperation with the federal government. The Squaxin Island, Lower Elwha, Port Gamble and Suquamish Indian tribes are also engaged in extensive on-reservation enhancement projects. These are but just a few of the examples of substantial enhancement and planting programs carried on by treaty tribes in Western Washington.

Tribal governments do not consider the power to regulate on-reservation fishing as merely theoretical. They are expending hundreds of thousands of dollars to develop and regulate their on-reservation fisheries. As noted above, several tribes have developed fish hatcheries or other fish rearing facilities. (See footnote 19) The development of these on-reservation fisheries is consistent with the purpose for which the reservations were originally established.

State regulation of on-reservation fishing would destroy the ability of Indian tribes to gain economic self-sufficiency through the development of on-reservation fisheries. Such limitation of the treaty right reserved by the tribes would make Indian reservations — originally established to be homes for Indian tribes—mere useless parcels of land to be lived upon but not developed. The principles of tribal self-government, which ensure the continuation of Indian nations, their governments and way of life would be rendered nugatory.

B. Issues suggested for decision by respondents are not ripe for adjudication and this case should be limited to the single issue presented for review

Both the respondent State of Washington and respondent Northwest Steelheaders have sought to greatly expand the issues presented by the petitioners' request for a writ of certiorari. (*See* State Response, p. 1, 2, 24, n. 14, and Northwest Steelheaders' Response, p. 2-3.) Petitioners sought review of but one issue: The State's authority to regulate Indian fishing on an Indian reservation. Respondent's invite this Court to consider two additional and quite distinct issues: An interpretation of the Indian treaties with the federal government; and a determination to the

effect that Indian fishermen do not have a treaty right to fish for so-called artificially-propagated salmon.

Respondent State of Washington raised these same issues in its cross petition for certiorari. This Court without reservation dismissed the State's cross petition as being not timely. This Court's action left for review *only* that single issue raised by petitioner.

Having lost their attempt to raise those issues directly before this Court, respondents now seek to raise them collaterally, thereby inviting this Court to make major decisions interpreting Indian treaties without the benefit of any substantial record. The record presented by the State related to *one* river—the Puyallup River, and one rather insignificant anadromous fish run—the steelhead run. From this limited record the State suggests that this Court has sufficient facts in which to determine the treaty rights relating to every river and all tribes of Western Washington.

The limited record in the instant case must be contrasted to that found in *United States v. Washington*. That case involves 21 tribes in Western Washington and all five of the treaties which were negotiated with the United States government and the tribes.[20] Judge Boldt has either decided (treaty allocation) or is in the process of deciding (hatchery entitlement) the same issues improperly raised by the respondents before this Court. The State seeks a determination that the treaty of the Puyallup Tribe and therefore the treaties of all tribes of Western Washington does not permit an allocation of harvestable fish between treaty and non-treaty fishermen. This very issue was decided in *United States v. Washington* and is *res judicata* as to the State of Washington. *City of Tacoma v. Taxpayers*

20. *See* footnote 2 *supra*.

of Tacoma, 357 U.S. 320 (1958). Judge Boldt determined that treaty and non-treaty fishermen were each entitled to the opportunity to harvest up to 50% of the harvestable fish. 384 F.Supp. at 343. This allocation was affirmed by the Ninth Circuit (520 F.2d 676 (9th Cir. 1975) and certiorari was denied by this Court.[21]

The fact that this issue of treaty allocation has been fully adjudicated is sufficient grounds for this Court to dispose of the matter. The scant record presented to this Court is added incentive to avoid the treaty interpretation issue.

This Court has long recognized that the interpretation of Indian treaties is a complex task. The Court has allowed and required a complete examination of the factual circumstances that surrounded the negotiation of Indian treaties. This Court has established rules of construction that require that treaties be interpreted in the way understood by the Indian people, resolving ambiguities therein in a manner most favorable to the Indian people. Quite obviously, the most important ingredient to treaty interpretation is such historical information.

The present case presents no evidence upon which to base an adequate interpretation of what the treaty must have meant to the Indian signers. Nowhere in the record does one find any historic or ethnohistoric reports dealing with the circumstances surrounding the treaty signing. Contrasted to this, the record in *United States v. Washington* contained lengthy anthropological and ethnohistorical reports submitted by an anthropologist whose evidence was found by the trial court to be "exceptionally well re-

21. It seems incongruous for the State now to deny an allocation between treaty and non-treaty fishermen, as the Department of Fisheries proposed in *United States v. Washington*, an allocation of one-third of all fish to treaty fishermen.

searched and reported."[22] 384 F.Supp. at 350. Proper adjudication of the meaning of the Treaty of Medicine Creek requires thorough investigation and inquiry into all of these matters and the participation of the other parties to that Treaty who are not now before this Court.[23]

The invitation to this Court that it adjudicate whether and to what extent Indian tribes are entitled to take a treaty share of so-called artificially-propagated fish in this case should be rejected. Again of primary concern to amici is the suggestion that this Court can decide such an issue that will affect fishing rights of numerous tribes pursuant to five treaties or a record dealing with only one river, one tribe. Amici submit that rivers cannot be evaluated without an understanding of how they fit into the entire water system. The situation in the Puyallup River is not unrelated to the situation, for example, on the Green River. Unfortunately, the record in this case is limited only to the Puyallup River. In fact, any attempt by petitioners to show the interrelationship between the Puyallup and other rivers was rejected by the trial court below.

The issue of the treaty right and hatchery fish is now pending before Judge Boldt in Phase II of *United States v. Washington*. Judge Boldt in his initial decision in *United States v. Washington* held that the Indian treaty right extended to fish artificially propagated. 384 F.Supp. 312, 411. This part of the decision was not dealt with on appeal by the State, although it might well have been. This basic

22. Evidence before the court in *United States v. Washington* involved the minutes of the Treaty negotiations, the instructions to the negotiators from Governor Stevens, evidence of contemporaneous writings concerning the situation at Treaty times, the testimony of nearly 50 witnesses and more than 350 exhibits. 384 F.Supp. at 348.

23. The Muckleshoot, Nisqually, and Squaxin Island tribes, amici herein, are also all parties to the Treaty of Medicine Creek.

ruling has been affirmed by the District Court in two subsequent major orders.[24] These subsequent orders were made necessary because the State of Washington insisted upon violating the decision in *United States v. Washington* and unilaterally imposing upon *all* tribes the holding in *Puyallup III* which was specifically limited to the Puyallup Tribe and River.

At the time that the Court ruled that hatchery reared fish were to be considered part of the treaty share, *Puyallup III* had *not* been decided, but the Court was mindful that the State of Washington might raise the issue before the state courts in *Puyallup III*. Therefore, consistent with the principles of comity, the Court deferred implementation of its prior order as it pertained to the Puyallup Tribe and River giving the state court the opportunity to comport its findings with the already set out federal determination.

The initial ruling by the District Court that hatchery fish were to be included within the treaty entitlement coupled with its intention to defer implementation of that portion of its ruling as it applied to the Puyallup Tribe and River has produced a confusing situation, especially in light of the opposite holding by the state courts. The Court has allowed all parties in *United States v. Washington* to present additional evidence on the subject during the Phase II portion of *United States v. Washington*. All plaintiff tribes, including the Puyallup Tribe, and the State of Washington, including the Department of Game, have indicated their intention to litigate the hatchery issue in *United States v. Washington*. The District Court by order dated December 15, 1976 has set January 9, 1978, as the date when this issue will be finally litigated. The parties in *United States*

24. Order of Oct. 22, 1975; Order of Aug. 13, 1976.

v. Washington are now engaged in extensive discovery on this very point, and are looking forward to trial. The determination to be made by the District Court on this issue will deal with not only the Puyallup River, but with all rivers and all tribes within Western Washington. The District Court will be in the position to evaluate the evidence and study its interrelation. Quite obviously, that Court would be in a better position to make an initial ruling on the treaty entitlement to hatchery fish based upon the record to be developed in *United States v. Washington—Phase II*. This Court should not go beyond its grant of certiorari and deal with the hatchery issue, especially in light of the pending case now before the United States District Court for the Western District of Washington.

C. The decision of the court below, misapplies and ignores fundamental tenets of Indian law, is based on incorrect factual assumptions, improper analogies, and adopts a rationale thoroughly discredited by previous rulings of this Court.

1. *The court below ignores and misapplies fundamental tenets of Indian treaty construction.*

In reaching its decision, the Supreme Court of Washington thought it necessary to interpret the Treaty of Medicine Creek. (10 Stat. 1132) In so doing, the court listed a series of cases in which this Court has set down the principles and rules of construction required for the interpretation of Indian treaties. 86 Wn.2d 664, 672-74.

However, it appears that this recital was merely a gesture. The remainder of the lower court's opinion evinces no inclination to follow such rules. Indeed the court could not have applied such rules because the record is seriously deficient as to what the signers of the Medicine Creek

Treaty might have meant by the language used in that treaty.[25]

Rather, the state court attempts to derive meaning from Article 3 of the Treaty in two ways. First, it refers to dictionaries as to the meanings of the phrase "in common with," but makes no attempt to match those definitions to the historical and anthropological context in which they were used or to the canons of construction.

Secondly, the court seems to reason that the promises in the treaty were premised on the condition that there was an "inexhaustible supply of fish" and that there was no contemplation that there would have to be conservation requirements necessary to preserve the species. ". . . [T]he fish were there for the taking." *Department of Game, supra,* at p. 676. How the court proceeds from these statements to its conclusion does not appear. Nor are the statements based on fact.[26]

25. Of course, the state court did not have before it other signatories to the Treaty of Medicine Creek, including several *Amici* herein, and including the United States (which is not a *party* to *Puyallup v. Department of Game,* but participates as *Amicus.*)

26. The district court in *United States v. Washington,* on a record substantially more complete and extensive than that here found no such thing. There the court found:

> However, the Indians' harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, . . .

(Finding of Fact #5, 384 F.Supp. 312 at 351) The Court further found that concern over the continuing return of salmon was central to the religious and cultural beliefs of the tribes.

> The first salmon ceremony, which with local differences in detail was general through most of the area, was essentially a religious right to ensure the continued return of salmon. The symbolic acts, attitudes of respect and reverence, and concern for the salmon reflected a ritualistic conception of the interdependence and relatedness of all living things which was a dominant feature of the native Indian world view. Religious attitudes and rights ensured that salmon were never wantonly wasted and that water pollution was not permitted during the salmon season.

(Finding of Fact #6, 384 F.Supp. 312 at 351.

The statement that Article 3 of the Treaty of Medicine Creek is "clear and unambiguous in its face", (*Puyallup III,* 86 Wn.2d at 674) is not well taken. The meaning of the fishing provisions of the Medicine Creek Treaty and others in the Washington Territory have been litigated since the beginning of this century. *United States v. Winans,* 198 U.S. 371 (1905). What is clear is that treaty interpretation must proceed on the basis of full historical and anthropological evidence and proper application of canons of treaty construction, something which has not been done here. The mere recitation of the canons of treaty interpretation without application to available facts bearing upon the intentions of the parties should not be approved. Unfortunately, this Court has often had to remind the court below of the proper application of Indian treaty canons of interpretation. *(See Antoine v. Washington,* 420 U.S. 194 (1975).

2. *The "equal footing" theory of Puyallup III*

In its decision the State Supreme Court resurrects the argument that the treaties were intended to do no more than guarantee Indians equal rights with the non-Indian citizens. 86 Wn.2d 664, 676. Such reasoning has been consistently rejected by this Court. In *United States v. Winans* (198 U.S. 371 (1905)), the Court reversed a ruling of a lower federal court which had held that the Indians were on an "equal footing" with citizens of the United States and that they had thus acquired no rights but what any

inhabitant of the territory or state would have. *United States v. Winans* at 380. This Court rejected that reasoning noting that to adopt such reasoning would be to hold that the Indians had "... acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *United States v. Winans, supra,* at 380.

That reasoning was also used by the State Supreme Court in *State v. Antoine,* 82 Wn.2d 440, 511 P.2d 1351 (1973). There the state court held that an agreement with the Colville Tribes containing language similar to the Treaty of Medicine Creek only allowed hunting on ceded land "as long as the white man and other Indians were allowed to hunt there . . . .," in other words, on an "equal footing" with non-Indians. *(State v. Antoine,* 511 P.2d at 1357-58). Again the reasoning was rejected by this Court, the Court noting that the language ". . . does not support that interpretation or affect the supremacy clause's preclusion of qualifying state regulation." *Antoine v. Washington,* 424 U.S. 194, 206 (1975).

In this case, the state court reasons that the treaty should be interpreted to support the view that the intent of the parties ". . . as is clear from the provision's language, was to preserve equal treatment for the Indians." *Department of Game v. Puyallup* at 675.[27]

27. The state court held that "at the time of the treaty, equal footing with citizens of the territory was very significant. When the treaty was written, Indians were not citizens . . . ." 86 Wn.2d at 679. Therefore, it was important to guarantee them fishing rights in common with other citizens. How this guaranteed the Indians some important right is not clear. In fact, it appears that Washington did not restrict commercial fishing to citizens until 1899, (1899 Wash. Laws, Ch. 117, §2), and the State of Washington still allows non-citizens to fish. RCW 77.32.151 and

The District Court in *United States v. Washington* (384 F.Supp. 312 (1974)) made a contrary finding, well supported by an extensive record not found in this case. In *United States v. Washington,* the District Court held as follows:

> There is nothing in the written records of the Treaty Councils or other Council discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians.

(Finding of Fact 26, *United States v. Washington,* 384 F.Supp. 312 at 357.

3. *The incorrect analogy between modern salmonoid propagation methods and treaty era cultivation of shellfish*

The state court finds that the Treaty of Medicine Creek does not reserve a right to fish on artificially-propagated fish stocks. 86 Wn.2d 664, 682. The court holds that the exclusion of Indians from shellfish beds staked and "cultivated" by non-Indians indicated that the "impact" of the Treaty was to "distinguish natural resources from artificial sources." *Supra,* at 682.

This holding violates standard Indian treaty interpretation. Certainly by specifically excluding "artificial" shellfish but not mentioning "artificial" or "hatchery" fish, no exclusion of such fish was intended. Additionally, the Court's decision on this issue is based on no facts or record what-

161. If the State Court means that the treaty guaranteed the Indians the rights to fish at off-reservation places, and if in fact all inhabitants of the territory had that right anyway, then the treaty granted or reserved nothing to the Indians. This reasoning has, of course, been consistently rejected *United States v. Winans,* 189 U.S. 371 at 380.

ever. The Court cites nothing to support the contention that the propagation of artificial salmonoid fishes (of which steelhead are one) was unknown at at the time. Standard fisheries texts indicate otherwise.[28]

It may be true that the artificial propagation of the anadromous steelhead trout was not being attempted in Washington Territory at the time of the Medicine Creek Treaty, but neither was the artificial propagation of shellfish—if we define artificial propagation to mean, as does it in salmonoid hatchery production; reproduction, multiplication or increase in numbers using unnatural or artificial methods.[29]

The shellfish fishery in Washington Territory at the time of the Treaty of Medicine Creek was only involved in harvesting of wild or natural oysters.[30] "Cultivated" beds as used in the Article 3 can only have meant the privately staked areas of tidelands where wild oysters, harvested

28. Successful experimentation with the artificial propagation of salmonoid species began in 14th century Europe. In 1863 a hatchery was established for the production of salmonid fishes in Germany. The first publicly owned salmonid hatchery was established in France in 1852. An American researcher developed a new and more effective method for artificial fertilization of the eggs of salmonoid fishes in 1856. In 1857 an American researcher published a text on the artificial propagation of salmonoid fishes which reflected years of research. The first American salmon hatchery was constructed in New York in 1864. Davis, H.S., *Culture and Diseases in Game Fishes*, University of California Press, 1967; pp. 5 through 8.

29. See Ingersoll, Ernest; "The Oyster, Clam, Mussel, and Abolone Industries"; Part XX of Vol. II of Section V of: *The Fisheries and Fish Industries of the United States*, by George Brown Goode, U.S. Commission on Fish and Fisheries, 1887, Washington, D.C. pp. 505-626.

30. Sayce, Clyde, Shellfish biologist for the Washington State Department of Fisheries, *History of the Oyster Industry in Washington State;* in "Terrastrial and Ecological Studies of the Northwest," Eastern Washington State College Press, Cheney, Washington, publication due, March, 1977.

from the natural beds, were transplanted or staked.[31] This removal had little to do with multiplication or reproduction as can be readily seen from the fact that the great natural oyster beds of the Territory were depleted almost to extinction by the late 19th Century.[32]

Removal of wild oysters to the "cultivated" beds had nothing to do with reproduction. Rather, such removal made the "culled" wild oysters more convenient to harvest; established property rights to the wild oysters; and provided a place where the wild oysters might grow to a larger size.[33]

To attempt to analogize the word "cultivated" as used in 1855 (and applicable only to shellfish) to the modern artificial propagation of anadromous salmonoid fishes (and without reference to the *reasons* for such propagation) is serious error. Amici urge this Court to allow these issues to be tried in Phase II of *United States v. Washington, supra,* where an appropriate record may be developed.[34]

D. The argument that planting of steelhead maintains the natural run on the Puyallup River.

At least two Justices below appear to have voted to sustain the court's ruling as a result of misunderstanding a State exhibit.

31. Sayce, Clyde, *supra, op cit.*

32. Little, A. C., "10th and 11th Annual Reports of the Washington State Fish Commissioner," 1901; pp. 28-29, 60-63.

33. *See also* Cooper, James G., "Pacific Coast Oyster," Overland Monthly, Vol. XXIII, No. 138, June 1894, pp. 648-660; Townsend, Charles H., "Observations Respecting the Oyster Resources and Oyster Fisheries of the Pacific Coast," Report of the Commissioner for 1889 to 1891, U.S. Commission on Fish and Fisheries, 1893, Vol. XVII, pp. 343-372.

34. In Phrase II of *United States v. Washington*, the treaty tribes have alleged that artificial propagation has been made necessary to replace natural run fish destroyed by State action or in action in derogation of the treaties.

In his concurring opinion, (86 Wn.2d 664, 690) Justice Rosellini holds that the planting of steelhead in the Puyallup River maintains the natural run in that river and that, therefore, any apportionment of the run is "legally incorrect." (86 Wn.2d at 694). In order to support his theory, he publishes a table (labeled Respondent's Exhibit 74-2) in the text of his opinion, (*supra*, p. 695) as proof that without large plantings the return of steelhead to the Puyallup River would be minimal. (*supra*, p. 696.) This table, however, supports no such conclusion and is highly suspect as "scientific" data. The data, in fact, appears to support just the opposite conclusion. That is, as the number of plants increases, the catch decreases.[35] The conclusion drawn from the data is therefore erroneous.

Secondly, the data itself, is suspect. As a first inquiry, some attempt should have been made to go behind the data to determine how accurate it was.[36] Further, the table lacks several factors important to making any conclusions about the status of the Puyallup steelhead run. First, little data with regard to the catch size before planting began is shown. Twenty-six years of "plant" data but only two years of "non-plant" is not enough for an appropriate comparison. Second, no figures on the total run are present. (The "catch" figures certainly do not indicate total run as large numbers of fish escape both the commercial and sport fish-

35. For example, a catch in 1964 of 15,942 fish correlates to a "plant" of 65,000 fish. Yet a catch in 1969 of 11,602 fish (4,340 *fewer* fish) correlates to a "plant" of 67,000 fish. (2,000 fish *greater* than in 1964.) It is not clear how a "massive infusion" of hatchery fish has supported the run.

36. This data used on the table is suspect because of the probably inaccurate methods used for obtaining it. The "sports" catch is obtained through the use of non-mandatory punch card reporting and the Indian catch is obtained through a few fish buyers.

eries in the river and some steelhead are caught in marine commercial fisheries.) Finally, no information with regard to the numbers of fishermen, sport or commercial fishing on the Puyallup steelhead run is presented. "Catch" figures may simply be a reflection of the "effort" (*i.e.*, low effort, low catch; high effort, high catch) and not the abundance of steelhead present. In short, such "data" is a poor basis for decision on such important matters.

IV

CONCLUSION

This litigation originally involved off-reservation treaty rights of the Puyallup Tribe. Upon remand, the state court below, transmuted the case into one which expanded and extended state jurisdiction to control Indian fishing on an Indian reservation. This action seriously threatens the continued operation of fishing activities presently under the sole control of numerous tribal governments, both treaty and non-treaty, in the State of Washington.

Treaties and agreements between the tribes and the United States setting up reservations guaranteed exclusive fishing rights and control to the Indian tribal governments. To abrogate or impair this tribal government control would be to seriously undermine the nature and extent of the promises originally made to the Indian tribes. If such an extension of state authority is to be made it is for Congress to do so. No grant of such authority to the State presently appears in case law or legislative acts. Public Law 83-280 (18 U.S.C. §1162) contains an express disclaimer against state interference with Indian tribal government control of fishing on the reservation.

In responses to the petitioner's request for a writ of certorari, the State of Washington and other parties have urged issues which should not be decided in the present context. They have invited the Court to reinterpret the Treaty of Medicine Creek and, therefore, quite possibly all Indian treaties in Western Washington. To do so without the presence and participation of the treaty tribes and the United States government would undoubtedly yield an incorrect result. These matters have already been extensively litigated in the federal action of the *United States v. Washington, supra*. The decisions there are *res judicata* as against the respondent State of Washington.

The Court is also invited to decide whether treaty tribes should have a share of so-called artificially propagated fish. This request is being made on a wholly inadequate record which does not take into account the reasons it became necessary to begin to artificially propagate fish nor the extensive propagation efforts of the tribes themselves. This matter is currently being fully litigated in the United States District Court for the Western District of Washington where all the complex facts involving the reduction in natural runs, the building up of artificial runs, the relative contributions of state, federal and tribal governments and other factors can be considered. The District Court is already engaged in substantial fact finding on this issue and

the matter is set for trial on January 9, 1978. This Court should reject any invitation to prematurely decide these issues.[37]

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT
By MASON D. MORISSET
Counsel for Amici Curiae

ALAN C. STAY
MICHAEL TAYLOR
Counsel for Amici Curiae

January 24, 1977

37. A just result in the present controversy would obtain if the state court's decision were vacated and all further proceedings in the present cause stayed pending completion of the trial in "Phase II" of *United States v. Washington* and the completion of current appeals to the Ninth Circuit regarding the propriety of federal court injunctions against Indian tribes for on-reservation fishing. The District Court for the Western District of Washington has exerted this authority on several occasions in the continuing case of *United States v. Washington*. Thus the State of Washington is not without a remedy if it feels it absolutely necessary to request a closure or reduction of on-reservation fishing. While amici do not necessarily admit the propriety of this action, nevertheless at the present time it exists as a viable alternative to state court action.

APPENDIX A

No. 9213

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. STATE OF WASHINGTON, *et al.*, *Defendants*	Filed 10-18-74 ORDER FOR PROGRAM TO IMPLEMENT INTERIM PLAN

IT IS HEREBY ORDERED that the following program is approved as an initial program to implement the Interim Plan approved by this court on March 22, 1974.

It is recognized that this program is subject to modification and further refinement as additional information and further experience become available. The parties will continue to develop such information and experience and will consult frequently with each other on general and specific problems or conditions in an effort to achieve more completely and as rapidly as possible full compliance with the spirit and objectives of the Orders of March 22, 1974. Any modifications or refinements agreed to by the affected parties shall become effective upon filing with the court without further action or approval of the court unless such further action is specified therein. Any party may submit requests for other modifications or refinements for approval or other appropriate Order by the court.

Tribes having qualified for self-regulation are not bound by the particulars of this program, other than as directed by the terms of Final Decision No. I and the Injunction entered pursuant thereto.

IMPLEMENTING PROGRAM

A. Guideline Principles for Regulating Fisheries.

Guideline Principles for Regulating Fisheries pursuant to Paragraph 2 of the Interim Plan and Stay Order shall be

filed with the court no later than October 4, 1974. If agreement has not been reached to those principles for regulating fisheries, they shall be submitted to the Expert and Master for determination of those to be implemented.

B. Exchange of Information Preliminary to Regulation.

Data required to be furnished by the state agencies under Paragraph 17 and 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order and data required to be furnished by the tribes under Paragraph 17 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished at the earliest practical time after such data becomes available, but no later than the following schedule:

1. At least sixty (60) days prior to entry of a run into the first fishery subject to state control, run, size predictions, numbers of harvestable fish set pursuant to Paragraph 17 of the Injunction and information concerning run size, timing and condition requested by the tribes pursuant to Paragraph 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished by the state agencies.

Until such time as predictions of steelhead run size are possible, Game shall determine the harvestable portion of the run in the best manner practicable, after consulting with the plaintiffs to receive their suggestions. Such predictions relating to harvestable numbers of fish shall be subject to review if the tribes believe there is better information from another source. If the parties cannot agree on the best source, the court shall make a determination through the Master in consultation with its Expert advisor. All predictions of harvestable numbers shall be further subject to review during the fishing season as additional information is obtained.

2. At least fifty (50) days prior to the entry of a run into the first fishery subject to state control, the tribes shall furnish information concerning their anticipated fishing activity as requested by the state under Paragraph 17 of the Injunction.

3. At least forty-two (42) days before a proposed opening of fishing, the state agencies and tribes shall exchange proposed off-reservation fishing regulations affecting the particular fishery.

4. At least twenty-one (21) days before a proposed opening, regulations shall be adopted and filed pursuant to Paragraph 1 of the Interim Plan and Stay Order; *provided* that the time periods under Paragraphs 3 and 4 above shall not be applicable to regulations filed prior to September 15, 1974; *provided further* that for such latter regulations filed after the date of this order at least seven (7) days notice of such regulation shall be given before a fishery is opened; and *provided further* that emergency regulations are enforceable upon filing them with the court and service upon the other parties affected of a copy of such regulations and a statement of the facts and circumstances of the emergency on which the regulation is based. Any party may respond and seek immediate review. Requests for emergency consideration by the court will be given priority and determined rapidly.

The 1974 Puget Sound coho fishery shall be apportioned according to the principles in the Interim Plan. It is recognized that there is not sufficient time available to adhere to the schedule of information exchange specified in the plan. Therefore, on Monday, September 30, 1974 at 9:30 a.m. Fisheries and the plaintiffs shall meet with the Master in an attempt to reach agreement on the numbers of harvestable fish to be divided.

C. Limitation on Harvest.

Whenever such closure or curtailment will (1) increase the opportunity of the other fishery (i.e., non-Indian or Indian, respectively) to take more of the harvestable portion of such run, and (2) not result in overescapement for such run, the Department of Fisheries will close or curtail the non-Indian fisheries on any run of salmon when the non-Indian catches reach or are expected to reach 50% of the harvestable portion of that run. That Department may likewise close or curtail Indian off-reservation commercial fisheries on said run whenever those fisheries have taken 50% of the harvestable portion of said run. The De-

partment of Game may close or curtail the Indian off-reservation steelhead commercial fisheries or the non-Indian sport fisheries, respectively, on any river system steelhead run whenever such fisheries have taken 50% of the harvestable portion of said run. For purposes of this Paragraph the harvestable portion of the run shall be the number determined by the Department of Fisheries for salmon or the Department of Game for steelhead and supplied in accordance with Paragraph B.1 above.

D. Identification of Indian-Caught Steelhead.

The parties agree that it is desirable to develop mechanisms for assuring that steelhead other than those lawfully taken by Indian treaty fishermen do not enter commerce contrary to state law. The tribes and the Indian Fisheries Commission shall coordinate efforts with the Department of Game to develop a plan for meeting the objectives of preventing unlawfully caught non-Indian fish from entering commerce and providing a means for catch reporting and shall submit their joint recommendation to the Court by November 1, 1974, for the Court's consideration and/or official tribal and Department of Game action.

E. Catch Data.

1. Commerical catch reports shall be made by non-state licensed Indian fish buyers on forms (fish tickets) provided by the state agencies, except for the Quinault Indian catch which may be made on tribally issued fish tickets. Indian fish buyers will submit a copy of such fish tickets daily to the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service which shall communicate to the applicable state agency by a copy of the fish ticket or otherwise, data concerning the total catch by species, area of catch and tribe before the close of business of the day on which such reports are received. Copies of fish tickets reporting Indian catch purchased by state-licensed fish buyers shall be made available to the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service by the state agencies within one day of the date that such reports are received.

2. For each run of fish the state agencies shall provide the Northwest Fisheries Program Office of the U.S. Fish

and Wildlife Service or to the tribes summaries of the non-Indian commercial catch no less than weekly and sport catch biweekly.

F. Determination of Tribal Treaty Status and Fishing Areas.

The defendants shall not, with respect to any Indian tribe or group which has not specifically been determined by this court to be entitled to an interim or permanent basis to be recognized as a treaty tribe, treat any off-reservation taking of fish from stocks of the case area by such tribe or group as treaty fishing in making any allocation of fish to treaty Indians or in restricting the fishing of tribes recognized by this court as treaty tribes pursuant to the Decree and Orders in this case, without first obtaining the concurrence of the tribes involved.

2. In order to be entitled to exercise its off-reservation treaty fishing rights, any tribe allowed to intervene in this case to assert its claim of treaty fishing rights shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty status and tribal organizations upon which the court may make a preliminary determination as to whether such tribe is to be dealt with as a treaty tribe entitled to fish at specified locations pursuant to the Interim Plan and Stay Order pending final determination of said tribe's status after a full hearing; *provided*, however, that nothing in this paragraph shall preclude members of such tribes from fishing off-reservation in conformity with state regulations applicable to anadromous fish, to the same extent as non-treaty right fishermen. Any court order permitting such interim fishing may impose such special conditions as it deems appropriate and shall set a schedule for presentation of evidence, briefing, and a full hearing on such issues and determination by the court. Any party disputing a tribe's claim of treaty entitlement or the recognition of specific usual and accustomed places shall cooperate in allowing the matter of final determination of such matters to be made promptly and as rapidly as the court calendar and the interests of justice permit.

G. Non-Anadromous Fish and Shellfish.

1. In order to be entitled to exercise off-reservation treaty fishing rights to non-anadromous fish and shellfish, any tribe party to this case shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty entitlements to such non-anadromous fish and shellfish upon which the court may make a preliminary determination as to the tribe's entitlement to such species, pending final determination of tribal treaty right entitlement to non-anadromous fish and shellfish; *provided*, however, that nothing in this paragraph shall preclude members of such tribes from fishing off-reservation in conformity with state regulations applicable to non-anadromous fish and shellfish, to the same extent as non-treaty right fishermen. Following such preliminary determination, off-reservation fishing areas shall be opened only to the extent that tribes so established to have entitlement to non-anadromous fish and shellfish adopt and file with the court and defendants tribal regulations for the non-anadromous fishing activities of their members specifying the areas to be opened to fishing by tribal members. Any party disputing a tribe's claim of treaty entitlement or the recognition of specific usual and accustomed places shall cooperate in allowing the matter of final determination of such matters to be made promptly and as rapidly as the court calendar and the interests of justice permit.

2. The biologists of the defendants and biologists for the tribe shall meet to formulate general principles to be utilized as guidelines to be flexibly applied in the adoption of specific fishing regulations applicable to particular species of non-anadromous fish and shellfish. Such guideline principles shall be filed with the court no later than November 1, 1974.

3. The parties, or any of them, may invoke the continuing jurisdiction of this court in order to determine:

a. The procedure and/or method for adopting management principles with respect to any particular species of non-anadromous fish or shellfish;

b. The species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement);

c. Questions of allocation between plaintiff tribes and non-Indian fishermen of the harvestable portion of the specific species on non-anadromous fish or shellfish;

d. A timetable for the taking of evidence regarding any particular non-anadromous species or shellfish; and

e. Such other matters as the court may deem appropriate.

H. Expiration of Interim Program.

This Order for Program to Implement Interim Plan shall continue in full force and effect until further order of this court.

DATED this 8th day of October, 1974.

GEORGE BOLDT
/s/ GEORGE BOLDT
Sr. United States District Judge

APPENDIX B

Biologists who work for Indian tribes and organizations or are available for assistance in the *U.S. v. Washington* case area—as of August 6, 1976.

Biologist	*Affiliation*
Larry Gilbertson	Quinault Tribe
Phil Rogers	Quinault Tribe
Terry Wright	Quinault Tribe
Larry Lestelle	Quinault Tribe
Larry Feldman	Quinault Tribe
Bill Grubb	Quileute Tribe
Rick Klinge	Hoh Tribe
Rich Mattson	Hoh Tribe
Arnold Elofson	Lower Elwha Tribe
Larry Rutter	Port Gamble Tribe
Phil Mundy	Point No Point Treaty Council
Rick Harris	Squaxin Island Tribe
Steve Wilson	Nisqually Tribe
Paul Svoboda	Puyallup Tribe
John Kerwin	Puyallup Tribe
Cliff Bengston	Tulalip Tribe
Rick Granstrand	Skagit System
Richard Cooper	Nooksack Tribe
Chris Weller	Small Tribes Organization Of Western Washington
Ron Costello	Small Tribes Organization Of Western Washington
Lars Mobrand	Small Tribes Organization Of Western Washington
Dick Navarre	Northwest Fisheries Program
Paul Wares	Northwest Fisheries Program
Fred Olney	Northwest Fisheries Program

Biologist	*Affiliation*
Walt Ambrogetti	Northwest Fisheries Program
Roger Wolcott	Northwest Fisheries Program
Tom Payne	Northwest Fisheries Program
John Meyer	Northwest Fisheries Program
Jim Heckman	Northwest Indian Fisheries Commission
Mike Grayum	Northwest Indian Fisheries Commission
Michele Anderson	Northwest Indian Fisheries Commission
Gary Graves	Northwest Indian Fisheries Commission

APPENDIX C

FISH PLANTS 1976

Tribe	*Number of Fish*	*Species*	*Place Planted*
Squaxin Island	300,000	Coho	Peal Passage
	50,000	Chum	Educational Hatchery
Tulalip	120,000	Fall Chinook	
	329,000	Chinook	
	500,016	Coho	
	402,500	Chinook	
	200,000	Chum	Mission Creek
	10,500	Rainbow Trout	Tulalip Creek Reservoir
	30,000	Steelhead	
Upper Skagit (Sauk-Suiattle)	100,000	Coho	Old Sauk-Channel
	150,000	Coho	Illabot Creek
	300,000	Coho	Newhalem Ponds
	100,000	Coho	Upper Dam Creek
	150,000	Coho	Upper Jackman Creek
	50,000	Coho	Davis Slough
	100,000	Coho	Finney Creek
	100,000	Coho	Bacon Creek
	100,000	Coho	Clear Creek
Makah	250,000	Coho	Sooes River
	250,000	Coho	Waatch River
	2,500	Rainbow Trout	Hobuck Lake
	1,000,000	Chum	Sooes River
Hoh	150,000	Coho	Braden Creek
Lower Elwha	2,000	Rainbow Trout	Beach Lake
Lummi	250,000	Steelhead	Tribal Hatchery
	1,000,000	Chum	Tribal Hatchery
	2,000,000	Coho	Tribal Hatchery

Tribe	*Number of Fish*	*Species*	*Place Planted*
Muckleshoot	250,000	Coho	White River
	1,500	Rainbow Trout	Beaver Ponds
	350,000	Chum	Green River
	300,000	Chum	Quilcene
Port Gamble	300,000	Chum	Tribal Hatchery
	100,000	Coho	
Puyallup	250,000	Chum	Swan Creek
Suquamish	50,000	Chum	Tribal Hatchery
Nisqually	500,000	Coho	
	35,000	Chum	
Steilacoom	50,000	Coho	
Quinault	1,000	Rainbow Trout	Camp Chitwin Lake
	3,000,000	Chum	Cook Creek
	1,200,000	Coho	Cook Creek
	500,000	Fall Chinook	Cook Creek
	500,000	Fall Chinook	Cook Creek
	150,000	Steelhead	Cook Creek
	50,000	Coho	Moclips River
	150,000	Coho	Humptulips River
	100,000	Coho	Queets River (Harlow Creek)
	100,000	Coho	Raft River
	20,000	Coho	Taholah School

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FISH PLANTS
1975

Tribe	*Number of Fish*	*Species*	*Place Planted*
Lummi	57,000	Steelhead	S. F. Nooksack
	93,000	Coho	S. F. Nooksack
	3,000	Coho	S. F. Nooksack
	550,000	Chum	Kwina Slough
	13,072	Fall Chinook	S. F. Nooksack
	216,067	Fall Chinook	No Mark
	9,700	Coho	Sea Pond
	7,000	Coho	Sea Pond
	81,900	Coho	Sea Pond
	72,000	Coho	Sea Pond
	14,182	Coho	CWT Adipose
	3,085	Coho	Sea Pond
	27,810	Coho	Sea Pond
	71,800	Coho	Sea Pond
	225,000	Chum	Circular Raceway Research Facility
	29,400	Coho	Sea Pond
	25,000	Coho	Circular Raceway Research Facility
	25,040	Coho	Sea Pond
	33,787	Coho	Sea Pond
Tulalip	750,000	Silver	
	350,000	Chinook	
Squaxin	650,000	Coho	Peal Passage
	50,000	Coho	Peal Passage
	250,000	Chum	Peal Passage

A-13

COOPERATIVE FISH PLANTS WITH U.S. FISH AND WILDLIFE SERVICE
1975

Tribe	*Number of Fish*	*Species*	*Place Planted*
Hoh	250,684	Coho	Braden Creek
	79,316	Coho	Hoh River
Lower Elwha	2,000	Rainbow Trout	Beach Lake
Lummi	1,496,580	Coho	Tribal Hatchery
	1,000,000	Chum	Tribal Hatchery
	1,470,000	Coho	Tribal Hatchery
Muckleshoot	1,000	Rainbow Trout	Beaver Ponds
Makah	250,000	Coho	Waatch River
	250,470	Coho	Sooes River
	1,500,000	Chum	Sooes River
	2,500	Rainbow Trout	Hobuck Lake
Port Gamble	100,000	Chum	Little Boston Creek
Quinault	1,000	Rainbow Trout	Camp Chitwin Lake
	327,650	Fall Chinook	Cook Creek
	315,600	Fall Chinook	Cook Creek
	1,693,973	Chum	Cook Creek
	400,000	Coho	Cook Creek
	639,029	Coho	Cook Creek
	232,368	Coho	Humptulips River
	94,032	Coho	Harlow Creek
	100,000	Coho	Raft River
	80,000	Coho	Moclips River
	100,000	Coho	Copalis River
	15,000	Coho	Taholah School

COOPERATIVE FISH PLANTS WITH U.S. FISH AND WILDLIFE SERVICE 1975

Tribe	*Number of Fish*	*Species*	*Place Planted*
Quinault	250,000	Coho	Quinault Reservation
	48,500	Steelhead	Cook Creek
	451,040	Steelhead	Quinault Resource Development Program
Squaxin Island	250,000	Chum	Educational Hatchery
Tualip	3,225	Rainbow Trout	Ross Lake
	10,500	Rainbow Trout	Tulalip Creek Reservoir
	200,170	Chum	Mission Creek

APPENDIX D

UNITED STATES DISRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA

UNITED STATES OF AMERICA, et al., *Plaintiffs,* v. STATE OF WASHINGTON, et al., *Defendants.*	CIVIL NO. 9213 Order Re: Rules of Procedure for Fisheries Advisory Board And Resolution of Disputes

This Order shall govern resolution of certain disputes and provide procedural rules for the functioning of the Fisheries Advisory Board.

This Order supersedes any inconsistent provisions of the "Order Establishing Fisheries Advisory Board" October 28, 1975.

1. *Composition of the Board*

1.1 The Fisheries Advisory Board shall be composed of two members, selected as follows:

(a) One member selected by the State of Washington and the defendant agencies.

(b) One member selected by the treaty Indian tribes.

1.2 There shall be in addition a non-voting Chairman whose function shall be to convene meetings, act as moderator, and perform such other duties as are provided herein, or agreed to by the parties, or directed by the court. Dr. Richard Whitney, the court's technical advisor, shall continue to serve as Chairman.

1.3 The State and the tribes are responsible for selecting their representatives and shall promptly inform the chairman of any changes or substitutes appointed by either the State or the tribes. The representatives shall serve as the

members of the Advisory Board until the chairman is notified by either the Northwest Indian Fisheries Commission or the State of the selection of new or alternate representatives.

2. *Jurisdiction and Authority of the Board*

2.1 *Submission to Board.* The Board shall consider only those matters relating to the fishery resource that are submitted to it by the court or any party to this order.

2.2 *Committee Reports.* The Board members, upon agreement shall have the authority to appoint temporary committees to study particular matters submitted to the Board for which more information is needed. A committee shall have only those powers delegated to it by the Board members and shall report back to the Board by a date certain. Committee reports are not binding on any party or Board member and need not be filed with the court but shall be given to any party upon request. The Board may adopt such other and further procedures as are acceptable to the parties.

3. *Board Procedures*

3.1 The Board shall convene at the request of a member or any party or the court. The chairman shall give to all parties, amici, the Northwest Indian Fish Commission, and the members of the Board such notice of a Board meeting as is practicable, taking into account the urgency of the matters to be considered. Provided, however, that any party directly affected by the matters to be considered shall be given actual notice within such time as is reasonable in the then existing circumstances. Any party may object to the jurisdiction of the Board to hear any matter referred to it. In such a case the Board shall take no action until the court has determined that the Board has jurisdiction to hear the matter.

3.2 The Chairman shall preside over meetings of the Board. The Chairman shall briefly state the matter to be considered and then call upon the Board member or party referring the matter to the Board to make a presentation concerning it. In any proceeding, an affected party may be represented by the person of the party's choice. Any party

may call witnesses to give testimony in the nature of evidence before the Board. No person shall have a right to give testimony before the Board unless called as a witness by an affected party, a Board member or the Chairman. Board members may participate in questioning witnesses and the representative of the parties. Proceedings shall not be under oath but any portion thereof may be recorded at the request of any party. The Chairman may make whatever rulings deemed reasonably necessary in terms of limiting the number of participants and the length of time allowed to each participant.

To aid in an orderly procedure, any party requesting a meeting of the Board shall attempt to advise the Chairman as soon as possible as to the nature of the party's presentation, including the number of participants, time needed, etc.

3.3 The Board chairman or member designated by a majority of the Board shall prepare a written report of the Board's proceedings after each meeting which shall be filed with the court and served on all parties and amici. The report shall be limited to a summary of what transpired at a Board meeting, and shall include whenever applicable an exact statement of any agreements reached by the participants.

3.4 The court's technical advisor shall, upon the request of the court, or any party, report to the court and all parties, his analysis of the matters discussed in the Advisory Board meeting and recommendations, if any. Whenever practicable said analysis and recommendations shall be provided to all parties and the court in writing prior to a hearing.

4. *The following procedures are adopted for the promulgation and enforcement of State emergency conservation regulations.*

4.1 The State shall retain the responsibility for conservation closures.

4.2 This section is intended to further define paragraph 19 of the Injunction issued in *U.S. v. Washington*, 384 F.Supp. 312 (1974), which requires: "a statement of facts

and circumstances of the emergency on which the regulation is based."

4.3 No State conservation regulation which would close or limit an off-reservation treaty fishery which is open pursuant to tribal regulation shall be enforceable unless adopted pursuant to the requirements of this section: *provided,* the State may apply directly to the court for enforcement of an emergency conservation regulation that is adopted without following the procedures specified herein.

Any State emergency conservation regulation which complies with the procedures of this section, or is specifically approved by the court, may be enforced by the State.

4.4 As soon as the State has reason to believe that it may become necessary to enact and enforce an emergency conservation regulation affecting off-reservation treaty fishing, it shall give notice either directly or through the Chairman of the Fisheries Advisory Board to all affected tribes of the potential emergency specifying the data upon which the State bases its opinion that an emergency regulation may be necessary. The State shall continue to provide updated data to all affected tribes and to the Chairman of the Fisheries Advisory Board.

4.4.1 Each tribe that desires to be governed by the notice procedures and requirements contained in § 4.5 and 4.6 shall contribute to a central 24-hour telephone service to receive notice by the State of any proposed emergency conservation closure.

4.5 At least forty-eight (48) hours prior to the effective date of any State emergency conservation regulation which would affect off-reservation treaty fishing, the State shall:

4.5.1 Request that the court's Advisory Board convene to study the need for such regulation.

4.5.2 Serve on all affected tribes copies of any emergency regulation along with a statement of the basis of the alleged emergency and supporting data that would justify the proposed emergency conservation regulation.

4.6 The court's Advisory Board shall convene if desired

by any party at least twenty-four (24) hours prior to the effective date of the proposed State emergency conservation regulation and shall consider the propriety of the proposed regulation(s).

4.6.1. The State shall present to the Board all data supporting the State's proposed regulation with an explanation of the relevancy of such data.

4.6.2 Any affected party may present additional data or explanation thereof intended to rebut or support the State's presentation.

4.6.3 Whenever possible, the court's Advisory Board shall convene so as to facilitate oral presentation of all relevant data.

4.7 Reports of any Board recommendation shall be prepared consistent with paragraph 3.3 of these procedures.

4.8 Any affected party may seek immediate court review. Request for emergency consideration by the court will be given priority.

5. This Order does not apply to self-regulating tribes except where made applicable to them by Final Decision No. 1 and previous Orders of this court; provided, that by agreement between any self-regulating tribe and a State defendant, the procedures set out in this Order may be invoked to provide a hearing before the Board on any issue within the scope of this Order.

6. These rules and guidelines shall apply until further order of the court or until modified by agreement of all parties. If after a substantial period of time, barring any emergency, this Order proves unsatisfactory, any party may apply to the court for modification of the order. DATED THIS 17th day of December, 1976.

/s/ GEORGE H. BOLDT
Sr. United States District Judge